

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	FINAL
80590-s42K BY RONETTA BLACKBURN	)	ORDER
AND CHRISTOPHER THEODOR	)	

\* \* \* \* \*

The Proposal for Decision (Proposal) in this matter was entered on April 12, 1993. The Proposal recommended denial of a Beneficial Water Use Permit for Application 80590-s42K by Ronetta Blackburn<sup>1</sup> and Christopher Theodor. The application requested appropriation of 25.00 gallons per minute not to exceed 1.00 acre-foot of surface water per year from an unnamed tributary of Sand Creek at a point in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 18 for fish and wildlife by means of a pit from January 1 through December 31 of each year. Applicants filed timely exceptions to the Proposal but did not request oral arguments. Objectors filed a joint response to Applicants' exceptions without a request for oral arguments.

Applicants except to any Findings of Fact 8 and 15, and Conclusions of Law 4 through 10.<sup>2</sup> Applicants take exception

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<sup>1</sup> Consistent with the Applicants' advice in their exceptions letter, the spelling of Blackburn has been corrected. The error originated on the application form and appears to have been a clerical error.

<sup>2</sup> In their exceptions letter, Applicants stated exceptions to Conclusions of Law 8, 9, and 10 based on their arguments relative to unappropriated water and historic flows. Conclusions 8, 9, and 10 relate to issues of Objectors' standing, possessory interest, and adverse effects, not to unappropriated water and

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primarily to the Proposal's Findings and Conclusions that the requested volume is inadequate for the purpose and that unappropriated water is not available at the proposed point of diversion during the proposed period of use.

I. Applicants take exception to Finding of Fact 8 and Conclusions of Law 4 and 5 on the basis that the application was accepted by the Department with the volume of one acre-foot per year. To be viable, a fish habitat must be able to maintain a proper level of dissolved oxygen in the water.<sup>3</sup> From a complete review of the record in this matter, the viability of the proposed project for fish purposes, i.e., adequately oxygenated water, depended upon some level of continuous flow of water through the pond. The application identifies only enough water to fill the pond once each year with no identification of a volume of water to protect and maintain a continuous flow, the stated method of accomplishing the necessary oxygenation. No alternative method of maintaining the oxygen level in the pond was identified in the record.

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historic flows. In reaching this final decision, these statements by Applicants have been considered as they relate to the Findings of Fact and Conclusions of Law touching upon aspects of unappropriated water and historic flows, particularly Conclusions of Law 6 and 7.

<sup>3</sup> Generally recognized technical fact. Mont. Admin. R. 36.12.221(4) (1991). While not explicitly stated in the Proposal it is implicit in the findings and conclusions relative to the issue of the requested volume. It is also implicit in Applicants' statements in their exception to these findings and conclusions.

In their exception letter, Applicants suggest they could use solar power generated turbulence devices to oxygenate the water. This possibility was not a part of the project as identified by the application materials, testimony, or any other part of the case record. The suggestion of this technical design possibility is new evidence which cannot be considered. Mont. Admin. R. 36.12.228 (1)(a) and 36.12.229(2)(a) (1991).

An agency's final order may not reject or modify a finding of fact in a proposal for decision unless the agency first determines from a review of the complete record that the finding of fact was not based on competent substantial evidence or that the proceedings on which the finding was based did not comply with essential requirements of law. Mont. Code Ann. § 2-4-621(3) (1991). Finding of Fact 8 in the Proposal for Decision is based on substantial credible evidence in the record, is not in error, and consequently will not be modified.

Because a necessary factor in the system has not been included in the application, the operation described is not adequate to accomplish the intended beneficial use, and the application does not meet the criterion in Mont. Code Ann. § 85-2-311(1)(c) (1991).

II. In reference to Finding of Fact 15, Applicants and Objectors have pointed out an error in the description of the mechanics used to direct water from the drain ditch to users on the lower Kinsey canal. The substance of this finding of fact, however, is not the mechanism, it is the ultimate use of the

water collected in the drain ditch by irrigators on the Kinsey system. The error does not diminish the substance of the finding of fact. Nevertheless, for the sake of avoiding confusion from the error, Finding of Fact 15 is revised to read:

15. The water that flowed into and out of the pond before the drain ditch was cleaned, flowed back into the lower canal of the Kinsey Irrigation Company for further use by Meidinger Farms. Since the drain ditch was cleaned, the water flows down the ditch and eventually into the Yellowstone River in the winter. During the irrigation season the water is retained in Kinsey Irrigation Company's lower canal for further use. (Testimony of Christopher Theodor, Ronetta Blackburn, and Richard Meidinger.)

III. Applicants take exception to Conclusion of Law 6 based on their intention to protect the "historic" flow of water in the natural drainage which is not the result of runoff and seepage from the canals and fields of Kinsey Irrigation Company's irrigation project. The pond is in a natural drainage. The SCS analysis identifies the soil types in the area as natural recharge zones for a natural aquifer. The water rising in the pond may be seepage from the Kinsey ditches, but it also may be naturally occurring waters from the perched aquifer system. Furthermore, some of the Kinsey ditch water may have seeped into the aquifer, which is a naturally occurring water course, and hence out of Kinsey's possession and control.

The record in this case does not contain enough information to know precise amounts of water in the various parts of this hydrologic system, and there may not be information available anywhere to identify precise amounts. Even so, now that the

drain ditch has been cleaned and repaired to its original condition<sup>4</sup> and is functioning, there is still water in the pond. The testimony of Ronetta Blackburn indicates the pond has intercepted water that was not present prior to the pond's construction. This appears to be what is still filling the pond. But this water is not surface flow and surface flow is what the application was requesting an appropriation for. The identified source was surface water. The Hearing Examiner concluded in Conclusion of Law 7 that Applicants had not proven "there are unappropriated waters in the source of supply" (emphasis added).<sup>5</sup> This conclusion is consistent with the evidence in the record, is based on substantial credible evidence in the record, is not in error, and consequently will not be modified.

IV. Applicants take exception to Conclusion of Law 7 on the grounds that their intention is to protect the "historic flow" of water in the natural drainage which is not the result of runoff

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<sup>4</sup> In their exceptions, Applicants characterize the cleaning as "aggressive" and an "over excavation". Finding of Fact 11 calls the action just a cleaning. Nothing in the Proposal finds the cleaning went beyond a maintenance action. This is consistent with all the evidence in the record. Therefore, as to the cleaning, the Proposal for Decision is based on substantial credible evidence in the record, is not in error, and consequently will not be modified. Mont. Code Ann. § 2-4-621(3) (1991).

<sup>5</sup> The evidence in the record of this contested case is not sufficient to determine with assurance that the water now filling the pond is groundwater. But there is some indication the pond may be intercepting groundwater which is available for appropriation, e.g., water which has always been part of an historic wetlands or which is Kinsey seepage lost from their possession and control. If this were so, the water presently rising in the pond may be protectable as a groundwater development.

and seepage from the Kinsey irrigation project. Given the complexity of the hydrologic system prior to the cleaning of the drain ditch, it was proper for Applicants to request a water right rather than simply assuming all the water was Kinsey water which had not entered a natural water course, then contracting with them for the amount needed to operate their project. Nevertheless and as discussed above, the water now rising in the pond is developed groundwater, not the surface water applied for. Therefore, the permit cannot be issued.

Having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts, with the modifications made above, the Findings of Fact and Conclusions of Law as contained in the April 12, 1993, Proposal for Decision and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

**ORDER**

Application for Beneficial Water Use Permit 80590-s42K by Ronetta Blackburn and Christopher Theodor is hereby denied.

Dated this 27<sup>th</sup> day of July, 1993.



John E. Stults, Hearings Officer  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 27<sup>th</sup> day of July, 1993, as follows:

Ronetta Blackburn  
Christopher Theodor  
P.O. Box 1585  
Miles City, MT 59301

Meidinger Farms, Inc.  
HC 46  
Kinsey, MT 59338

Jack Carr  
Attorney at Law  
611 Pleasant  
Miles City, MT 59301

George W. Huss  
Attorney at Law  
507 Pleasant  
Miles City, MT 59301

Kinsey Irrigation Co.  
% Bill Ziebarth  
Kinsey, MT 59338

Ed Beyl  
HC 46  
Miles City, MT 59301

Walter Rolf, Manager  
Miles City Water Resources  
Division Regional Office  
P.O. Box 276  
Miles City, MT 59301  
(via electronic mail)

Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
1520 E. 6th Ave.  
Helena, MT 59620-2301

Cindy G. Campbell  
Cindy G. Campbell  
Hearings Unit Legal Secretary



BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION     )  
FOR BENEFICIAL WATER USE PERMIT     )     PROPOSAL FOR DECISION  
80590-s42K BY RONETTA BLACKBORN     )  
AND CHRISTOPHER THEODOR             )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on March 25, 1993, in Miles City, Montana, to determine whether a Beneficial Water Use Permit should be granted to Ronetta Blackburn and Christopher Theodor under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1991).

APPEARANCES

Applicants Ronetta Blackburn and Christopher Theodor appeared at the hearing in person and by and through counsel, George W. Huss.

Objector Ed Beyl appeared at the hearing pro se and as a witness for Kinsey Irrigation Company as past president.

Objector Meidinger Farms, Inc. appeared at the hearing by and through its president, Richard Meidinger, who is also President of Kinsey Irrigation Company.

Objector Kinsey Irrigation Company appeared at the hearing by and through counsel, Jack Carr, Esq.

John Viall, Vice President of Kinsey Irrigation Company, appeared at the hearing as a witness for Kinsey Irrigation Company.

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Jim Hagenmeister, member of Kinsey Irrigation Company, appeared at the hearing, but did not testify.

Jim Mathison, member of Kinsey Irrigation Company, appeared at the hearing, but did not testify.

Beth Weideman, Water Resources Specialist with the Miles City Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Walter Rolf, Manager of the Department's Miles City Water Resources Regional Office, appeared at the hearing.

#### EXHIBITS

Applicants offered 8 exhibits for inclusion in the record.

Applicants' Exhibit 1 is a photograph taken by Christopher Theodor depicting the wetland area where the pond is located. This photo was taken in January of 1992, before the pond was constructed.

Applicants' Exhibit 2 is a photograph taken by Christopher Theodor showing the gully which was threatening a Kinsey Irrigation Company canal. This picture was taken in January of 1992, before the pond was constructed.

Applicants' Exhibit 2A is a photograph taken by Christopher Theodor two weeks later than Applicants' Exhibit 2 and shows the gully being filled with dirt taken from the pond site.

Applicants' Exhibit 3 is a photograph taken by Christopher Theodor on or about March 22, 1993, of the pond after completion.

Applicants' Exhibit 4 is a photograph taken by Christopher Theodor on or about March 22, 1993, of the box constructed by Mr.

Theodor for the outlet of the pond which handled all the flow that came out of the wetland and directed the water into a ditch which subsequently directed the water into a Kinsey Irrigation Company canal.

Applicants' Exhibit 5 is a USGS quadrangle map entitled Kinsey, Mont. This map was originally produced in 1969 and photorevised in 1980. During the hearing Christopher Theodor outlined the wetland area and labeled it and the location of Applicants' residence in black ink. Prior to the hearing Mr. Theodor had outlined Section 18, Township 9 North, Range 48 East, Custer County,<sup>1</sup> in yellow. Kinsey Irrigation Company objected to the inclusion of this exhibit in the record as evidence of unappropriated water, but had no objection to the inclusion of the exhibit as evidence of the wetland area. The Hearing Examiner noted the objection and reserved a ruling to be made in the Proposal for Decision. Since the exhibit has very little probative value concerning evidence of unappropriated water, the objection to entering the map into the record for that purpose is sustained. However, the map does have probative value as to the existence of the wetland and is accepted into the record for that purpose only.

Applicants' Exhibit 6 is a photograph taken by Christopher Theodor on or about March 23, 1993, and shows water flowing in a

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<sup>1</sup>Unless otherwise stated, all land descriptions in this Proposal are located in Township 9 North, Range 48 East in Custer County, Montana.

drain ditch that would have gone through the wetland and through the outlet box if the drain ditch had not been cleaned.

Applicants' Exhibit 7 is a photograph of the same drain ditch as shown in Applicants' Exhibit 6 showing more of the ditch to the east. The photograph was taken by Christopher Theodor on or about March 23, 1993.

All exhibits except Applicants' Exhibit 5 were accepted into the record without objection.

The Department file was made available for review by all parties. Kinsey Irrigation Company objected to the maps and a letter prepared by SCS personnel who were not available for cross-examination. The maps and letter were submitted by Applicants as part of the application, not in preparation for the hearing. Objectors were aware of the existence of this material and assumed Applicant would request the presence of the person(s) who prepared the documents. Objectors could have subpoenaed those persons to appear instead of relying on Applicants to do so but elected to rely on Applicants who saw no reason to request the appearance of those persons. Accepting the maps and letter as part of the application, the Department file is entered into the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

**CASE #**

### FINDINGS OF FACT

1. Mont. Code Ann. § 85-2-302(1) (1991) states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Ronetta Blackburn and Christopher Theodor duly filed the above-entitled application with the Department on March 5, 1992, at 10:00 a.m. (Department file.)

3. Pertinent portions of the file were published in the *Miles City Star*, a newspaper of general circulation in the area of the source on July 8, 1992. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the Application. Three timely objections were received by the Department. Applicants were notified of the objections by a letter from the Department dated August 3, 1992. (Department file.)

4. Applicants seek to appropriate 25.00 gallons per minute not to exceed 1.00 acre-foot of water per year from an unnamed tributary of Sand Creek at a point in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 18 for fish and wildlife by means of a pit. The proposed period of appropriation is from January 1 to December 31, inclusive of each year. (Department file.)

5. The area Applicants excavated to create the pond was a designated wetlands at the time the USGS Kinsey, Mont. map was made in 1969. (Testimony of Christopher Theodor and Applicants' Exhibit 5.)

6. The pond was excavated by Applicants in the latter part of February 1992, without the benefit of a Water Use Permit from this Department. It has a graded bottom. One end is 12 to 15 feet deep, then an area of 8 to 10 feet deep, and the other end is approximately 6 feet deep. The pond would freeze in the winter without the 25 gallons per minute flow of water from the unnamed tributary of Sand Creek. Applicants' pond is located within the boundaries of Kinsey Irrigation Company. (Department file, Department records, and testimony of Christopher Theodor and John Viall.)

7. Prior to the pond excavation, there was a gully cutting through the wetland and threatening the Kinsey Irrigation Company canal. This gully was filled in during pond construction and a simple wooden box was constructed and placed at the pond outlet to provide a stable outlet into a ditch which would direct the water into the Kinsey Irrigation Company canal. (Testimony of Christopher Theodor and Applicants' Exhibits 2, 2A, and 4.)

8. Applicants have not requested a sufficient amount of water for a flow-through fish pond which is what was described at the hearing. A flow-through fish pond has the same amount of water flowing out of the pond that is flowing into the pond. Applicants have requested an amount of 1.00 acre-foot of water

per year. That amount would allow Applicants to fill the pond once without additional water flowing through the pond or additional water to replace the evaporation from the surface of the pond. Applicants clearly expressed the desire to have water flowing through the pond constantly which would require, at a flow rate of 25 gallons per minute, 40.33 acre-feet of water per year. The use would be nonconsumptive after the initial filling, which would be a consumptive use of 1.00 acre-foot. (Testimony of Ronetta Blackburn and Christopher Theodor, Department file, and well-known technical fact.)

9. Applicants allege the source of the wetland is a perched water table formed in lacustrine deposits which are slowly or very slowly permeable and may act as a dam to downward movement and lateral flow of groundwaters as well as surface waters. Applicants believe the source of the wetland is independent of the irrigation water flow. Objectors contend the wetland originates as a result of the leaky canals and return flows from irrigation. (Testimony of Christopher Theodor, John Viall, Richard Meidinger, and Ed Beyl.)

10. There are two major canals of the Kinsey Irrigation Company near the wetland area flowing during the irrigation season. One (the middle canal) is approximately three-eighths of a mile northwest of the pond across a highway just above the head of the drainage on which the wetland is located and the other (the lower canal) is immediately southeast of the pond. The middle canal begins at a point approximately three-eighths of a

mile southwest of the wetland. The lower canal begins approximately one-eighth of a mile southeast of the beginning of the middle canal. Kinsey No. 2 Pumping Station is located approximately three-eighths of a mile west of the designated wetland and very near the beginning of the Kinsey middle canal. There are also irrigated parcels which may drain into the drainage on which the wetland is located. (Department file and Applicants' Exhibit 5.)

11. In December 1992, Kinsey Irrigation Company cleaned a drain ditch within the boundaries of the project causing the flow into and out of Applicants' pond to cease.

In order for the pond to be a viable fish pond, the base flow and recharge must be re-established as it was when the pond was constructed a year ago before the drain ditch was cleaned. (Testimony of Christopher Theodor, Ronetta Blackburn, and John Viall.)

12. Kinsey Irrigation Company, after several false starts, originated as Kinsey Farms, Inc. in 1938. Some time later the name was changed to the Farm Security Administration and in 1945, the Kinsey Irrigation Company was formed to acquire the irrigation system constructed by the Farm Security Administration. (Department records.)

13. Kinsey Irrigation Company has performed studies or sponsored studies that indicate its canals should be lined with impervious material to stop the profuse leakage from its

s and ditches. Although an earlier attempt to line a canal



with concrete was unsuccessful, there are plans to line the canals in the near future. (Testimony of John Viall, Ed Beyl, and Richard Meidinger.)

14. In the last four or five years, Kinsey Irrigation Company has cut trenches below the east bank of the middle canal to alleviate the water pressure beneath the ground which was causing the east bank of the canal to slough. (Testimony of Ed Beyl.)

15. The water that flowed into and out of the pond before the drain ditch was cleaned, flowed back into the lower canal of the Kinsey Irrigation Company for further use by Meidinger Farms. Since the drain ditch was cleaned, the water flows down the ditch and into the Yellowstone River in the winter. During the irrigation season, the ditch is checked up by flash boards and the water is directed back into Kinsey Irrigation Company's lower canal for further use. (Testimony of Christopher Theodor, Ronetta Blackburn, and Richard Meidinger.)

16. Neither Meidinger Farms nor Ed Beyl have a water right and are users of Kinsey Irrigation Company. (Testimony of Richard Meidinger and Ed Beyl.)

17. Applicants own the proposed place of use. (Department file and testimony of Christopher Theodor.)

18. There are no planned uses or developments for which a permit has been issued or for which a reservation has been granted which could be affected by the proposed project. (Department file and records.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 3.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. See Findings of Fact 1 and 2.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1991) are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the

possessory interest, in the property where the water is to be put to beneficial use.

. . . .  
(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed uses, fish and wildlife, are beneficial uses of water. Mont. Code Ann. § 85-2-102(2) (1991). However, Applicants cannot have a viable fish pond without the 25 gallons per minute flow. See Findings of Fact 4, 6, 8, and 11. Applicants did not provide evidence of an alternative since the surface flow rate is no longer available.

5. Applicants have provided substantial credible evidence the proposed means of diversion and construction of the appropriation works are adequate. However, Applicants did not provide any alternate method to keep the pond from freezing since the surface flow is no longer available; therefore, Applicants have not provided substantial credible evidence that the operation of the appropriation works is adequate. See Findings of Fact 6 and 7.

Applicants diverted water from the proposed source and for the proposed purpose prior to filing an application or receiving a permit to do so. Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. Mont. Code Ann. §§ 46-18-212 (1991). The Department has no statutory

authority to deny a permit on such grounds. See In re Application 52031-s76H by Frost. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit. See In re Application 61978-s76LJ by Town.

6. Although Applicants believe the source of water they seek to appropriate is independent of the canal and ditch seepage and return flows (Finding of Fact 9), it is not unusual for seepage from irrigation ditches and canals and irrigation runoff to accumulate to the point where water flows constantly in drain ditches and natural waterways. See In re Application 70817-s430 by Aseltine. There is testimony of excess water in the ground causing the bank of the canal to slough. See Finding of Fact 14. The canals have been in existence for approximately 55 years. See Finding of Fact 12. The canals are leaking profusely and there is no evidence that they have not always been porous and leaky, although an unsuccessful attempt was made to line a canal with concrete. See Finding of Fact 13. At the time Applicants' Exhibit 5 was made in 1969, the canals had been in existence for approximately 30 years. Because of the location of the canals, the pumping station, and the lacustrine soils in the area, the seepage water could not and cannot escape and therefore manifests itself as a wetland area. See Finding of Fact 5, 9, and 10. This does not mean the water flowing through the wetland area is unappropriated. On the contrary, Kinsey Irrigation Company

collects this water and reuses it for irrigation of lands owned by Meidinger Farms, Inc. See Finding of Fact 15. An appropriator may collect, recapture, and use seepage water before it leaves his possession. Ide v. United States, 263 U.S, 497 (1923); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 267, 17 P.2d 1074 (1933). Since the wetlands area is within the exterior boundary of the Kinsey Irrigation Company, the company has control of the water which is still in its possession and therefore may collect, recapture, and use the seepage water.

7. Applicants have failed to provide substantial credible evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the proposed uses or that during the period in which Applicants seek to appropriate, the amount requested is reasonably available. Since the cleaning of the drain ditch, there has been no surface flow into the pond. See Finding of Fact 11.

8. Although neither Mr. Meidinger nor Mr. Beyl have water rights of their own, they were able to attain status as objectors because a person has standing to file an objection if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation. Mont. Code Ann. § 85-2-308(3) (1991). Since both Mr. Meidinger and Mr. Beyl are members of Kinsey Irrigation Company, their property and interests could have been adversely affected by the proposed project. See Finding of Fact 16.

9. Applicants have provided substantial credible evidence that they have a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is proposed to be put to beneficial use. See Finding of Fact 17.

10. The proposed use would not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Findings of Fact 18.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit 80590-s42K by Ronetta Blackburn and Christopher Theodor is hereby DENIED.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 12<sup>th</sup> day of April, 1993.



Vivian A. Lighthizer, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620  
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 12<sup>th</sup> day of April, 1993, as follows:

Ronetta Blackburn  
Christopher Theodor  
P.O. Box 1585  
Miles City, MT 59301

Ed Beyl  
HC 46  
Miles City, MT 59301


Kinsey Irrigation Co.  
% Bill Ziebarth  
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George W. Huss  
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Cindy G. Campbell  
Hearings Unit Legal Secretary